GOLDEN QUANTUM ACRES SDN BHD A

v.

SSU MANAGEMENT SERVICES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
NALLINI PATHMANATHAN J
[CIVIL APPEAL NO: 12A-345-09-2013]
19 DECEMBER 2013

CONTRACT: *Construction of terms of contract - Sale and purchase agreement - Delivery of vacant possession - Refusal to accept delivery of vacant possession due to defect in building - Claim for rectification costs and liquidated ascertained damages ('LAD') - Whether vacant possession accepted after five years - Claim for LAD for delay in handing over vacant possession - Whether vacant possession delivered according to clauses in agreement - Whether purchaser entitled to choose date to 'take' vacant possession* C D

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Interpretation of clauses - Failure to construct building according to contractual specifications - Whether there was delay in handing over vacant possession - Remedy - Whether claim for liquidated ascertained damages allowed* E

The appellant was the developer of a project known as "Desa Villas, Wangsa Maju" ('the project'). *Vide* two separate sale and purchase agreements dated 7 April 2004 and 26 July 2004, the appellant agreed to sell and the respondent agreed to purchase two properties, namely lots 17 and 18. In the course of construction, renovations were effected F to the two properties with the primary objective of combining lots 17 and 18 which were adjacent to each other. The primary agreements ('PA') executed by the parties were varied by a supplementary agreement dated 28 January 2005 and a second supplementary agreement dated 14 June 2006. On 10 January 2007, the appellant G issued an architect's certification and gave vacant possession of the properties to the respondent. However, the respondent maintained that the villas were defective in that they had not been built in accordance with the agreements and refused to take delivery of vacant possession. In 2008, the respondent commenced two actions namely Suit No. 653 H (for Unit 17) and Suit No. 659 (for Unit 18) and sought, *inter alia,* (i) damages for rectification costs amounting to RM400,000; and (ii) general damages and liquidated damages for late delivery under cl. 26.2 of the PA. The respondent then made an oral application to withdraw its claim for the liquidated and ascertained damages ('LAD') I without prejudice to bring proceedings in this aspect on a later date. On 30 October 2012, the High Court granted relief sought by the

respondent in the 2008 proceeding. Six weeks after the delivery of the decision, the respondent gave notice to the appellant that it was now prepared to and intended to take vacant possession of the properties. Taking the December date as the date of taking over of vacant possession, the respondent demanded a claim for LAD of some RM869,816.92 computed on the basis of a delay of five years and 133 days. The appellant objected and maintained that it was entirely inequitable as the appellant did hand over vacant possession of the property *vide* its letter of 10 January 2007 and that pursuant to cl. 27 of the PA, vacant possession was deemed to have been taken by the respondent fourteen days from the expiry of the notice issued to it. The learned Sessions Court Judge allowed the respondent's claim for LAD in the sum of RM869,816.92 on the basis of construction of cl. 26(3) and concluded that the LAD was to be computed from the date when delivery ought to have been effected, *ie,* 27 July 2007 until the day when it was actually delivered which she concluded to be 7 December 2012. She dismissed the appellant's contention that vacant possession had been given effectively as of the issuance of the certificate of fitness for occupation by DBKL under cl. 27(4) of the PA. Aggrieved, the appellant appealed against the decision of the learned Sessions Court Judge on the grounds, *inter alia,* (i) that the respondent had put forward an exaggerated claim; (ii) that the underlying complaint of the respondent related to the failure of the appellant to build the villas in accordance with contractual specifications; and (iii) that the construction adopted by the Sessions Court ignored the contractual mechanism for delivery of vacant possession in cl. 27.

Held (allowing appeal with costs):

(1) Although the appellant did not complete the works according to contractual specifications, the appellant complied with the provisions of cl. 27. Clause 26(2) provided specifically that if the appellant failed to deliver vacant possession of the villas in the manner stipulated in cl. 27, only then the appellant would be liable to pay the LAD. This meant that the developer must have delayed or abandoned the completion of the property *in toto*. The clause did not provide a remedy in a situation where the developer, *ie*, the appellant had completed the works but had done so in a shoddy manner that it failed to meet the contractual obligations. (paras 27 & 28)

(2) The respondent did not repudiate the contracts but chose to accept the houses and to claim for damages for the breach occasioned by the defective workmanship in the villas. The contracts remained afoot, such that cl. 27 came into play and continued to subsist notwithstanding the breaches occasioned by the defective

workmanship. As cl. 27 continued to subsist, it followed that vacant possession was deemed to have been given to the respondent with effect from 14 days of the date of the notice issued by the appellants dated 10 January 2007. (paras 28 & 29)

(3) The respondent was not entitled to choose a date which they deemed fit to 'take' or 'claim' vacant possession. To allow such a construction of cls. 26 and 27 would give rise to a vastly exaggerated claim. For a claim for damages arising from a failure of the appellant to construct the building in accordance with contractual specifications, the remedy available to the respondents was the cost of effecting such repairs to meet contractual specifications as well as consequential loss arising for the reasonable time during which the respondents had suffered a loss of use of the villas. (para 29)

(4) The respondent was required to mitigate its losses by ensuring that the repairs were effected within a reasonable time. They were entitled to be compensated on the basis of an objective and reasonable estimate of the time taken to effect the requisite works. This was not equivalent to a claim for LAD, although the quantum agreed upon may well be a reasonable estimate for the purposes of determining the quantum per day of delay. (para 29)

(5) The loss was not a loss for failure to deliver vacant possession, but instead damages recoverable for the delivery within the contractually specified period of villas which did not meet contractual specifications. As such, the learned Sessions Court Judge had erred in allowing the respondent's claim for liquidated damages for period of some five odd years giving rise to a claim for RM869,816.92 together with interest. (paras 30 & 31)

Case(s) referred to:

East Ham Corporation v. Bernard Sunley & Sons Ltd [1966] AC 406 ***(refd)***

Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd [1962] 2 QB 26 ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(not foll)***

Joo Leong Timber Merchant v. Dr Jaswant Singh Jagat Singh [2003] 5 CLJ 286 HC ***(refd)***

Kris Heavy Engineering & Construction Sdn Bhd v. Mah Sing Properties Sdn Bhd [2011] 1 LNS 572 HC ***(refd)***

Leong Lai Kuen v. Sentul Murni Sdn Bhd [2004] 5 CLJ 25 HC ***(refd)***

Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC ***(not foll)***

Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 55 r. 2

For the appellant - Logan Sabapathy (Peter Yap, Tan Lin Choon & Soo Yee Fei with him); M/s Amin Yap & Co
For the respondent - Chin Loi Sin; M/s Chin Loi Sin & Assocs

Reported by Sandra Gabriel

JUDGMENT

Nallini Pathmanathan J:

[1] This is an appeal against the decision of the learned Sessions Court Judge allowing the respondent's claim for liquidated and ascertained damages ('LAD') in the sum of RM869,816.92 for the 'late' handing over of two villas owned by the respondent. The respondent here was the plaintiff in the court below and will be referred to as such. In other words the defendant, who is the appellant here was ordered to pay the aforesaid sum as LAD for late delivery of the plaintiff's two villas. The learned Sessions Court Judge further ordered that the defendant pay interest at the rate of 4% and costs.

Background Facts

[2] The salient facts are not in dispute. I append here a chronology of the same which I have adopted from the comprehensive submissions of learned counsel for the defendant and the plaintiff.

[3] The defendant is the developer of a project known as "Desa Villas, Wangsa Maju" ('the Project'). The plaintiff purchased two villas from the defendant, described by the parties for convenience as Lots 17 and 18. *Vide* two separate sale and purchase agreements dated 7 April 2004 and 26 July 2004 the defendant agreed to sell and the plaintiff to purchase the two properties, namely Lots 17 and 18 upon terms set out in these agreements. The agreements were in the statutory form under Schedule H of the Housing Development (Control And Licensing) Regulations 1989.

[4] In the course of this construction the plaintiff sought and the defendant agreed to effect renovations to the two properties with the primary objective of combining Lots 17 and 18 which are adjacent to each other. To this end the primary agreements executed by the parties as set out above were varied by a supplementary agreement dated 28 January 2005 and a second supplementary agreement dated 14 June 2006.

[5] Recital C of the supplementary agreement of 28 January 2005 provides as follows:

> The Purchaser is desirous of certain renovation works being done on each of the said Parcels in accordance with its own plans and building specifications and the Purchaser hereby expressly acknowledges and agrees that these renovation works are in variance with the plans and building specifications as specified in the Principal Agreements and the Vendor has, pursuant to the specific request of the Purchaser, agreed to construct the renovation works in accordance with the Purchaser's plans and building specifications upon the terms, conditions and price as stipulated hereinafter.

[6] And cl. 8 of the supplementary agreement of 28 January 2005 provides:

> Subject as provided above, the Principal Agreements are hereby confirmed and all terms and conditions therein shall remain in full force and effect and will take effect from the date of this Supplementary Agreement. The Principal Agreements and this Supplementary Agreement shall be read and construed as one document and all references herein and therein to the Principal Agreements and/or this Supplementary Agreement as the case may be shall be the Principal Agreements as amended, varied and/or amplified by this Supplementary Agreement.

[7] As for the second supplementary agreement of 25 June 2006, Recital D provided as follows:

> The Purchaser is now desirous of further and additional works in each of the said Parcels and the Purchaser hereby expressly acknowledges and agrees that these further and additional works are in variance with the plans and building specifications as specified in the Principal Agreements and the First Supplementary Agreement and the Vendor has, pursuant to the specific request of the Purchaser, agreed to the said further and additional works in accordance with the Purchaser's request upon the terms, conditions and price as stipulated hereinafter.

[8] Clause 6 of the second supplementary agreement provides as follows:

> Subject as provided as above, the Principal Agreements and the First Supplementary Agreement are hereby confirmed and all terms and conditions therein shall remain in full force and effect and will take effect from the date of this Second Supplementary Agreement. The Principal Agreements, the First Supplementary Agreement and this Second Supplementary Agreement shall be read and construed as one document and all references herein and therein to the Principal Agreements and/or the First Supplementary Agreement and/or this Second Supplementary Agreement as the case may be shall be the Principal Agreements as amended, varied and/or amplified by the First Supplementary Agreement and this Second Supplementary Agreement.

[9] Construction proceeded under these varied agreements and on 10 January 2007 the defendant issued notices against, *inter alia*, architect's certification, giving vacant possession of the subject properties to the plaintiff.

[10] *Vide* letter dated 5 April 2007, the plaintiff took issue with the quality workmanship and completion of the above units and the development in general. The complaints included *inter alia*, poor painting finishes and mismatched tiles.

[11] However it is evident that the plaintiff did not treat the 'breaches' as being so serious as to warrant a termination of the agreements between the parties and refund of the monies it had paid for the villas. Instead the plaintiff wanted the defects in the villas which it complained of to be put right in accordance with the contractual specifications in the agreements above.

[12] The plaintiff contends that it disputed that the defendant had handed over 'valid' vacant possession of the villas. It maintained that the villas were defective in that they had not been built in accordance with the agreements. The plaintiff therefore refused to take delivery of vacant possession.

[13] In 2008 the plaintiff commenced two actions namely suit no. 653 (for Unit 17) and suit no. 659 (for Unit 18) against the defendant which were subsequently consolidated. The plaintiff sought damages against the defendant which were particularised in the region of approximately RM400,000 being rectification costs which the plaintiff maintained it had incurred in order to achieve the contractual specifications under the agreements.

[14] *Vide* these 2008 proceedings the plaintiff sought the following relief:

(a) Declaration that the defendant had breached the principal agreements and the supplementary agreements;

(b) Declaration that the subject properties had not been practically completed and vacant possession had not been validly given;

(c) Declaration that the architect's certificate is invalid and an order that the same be cancelled and/or set aside;

(d) General damages;

(e) Liquidated damages for late delivery under cl. 26.2 of the principal agreements. (Clause 26.2 deals with the provision of LAD. It provides that in the event the vendor (ie, the defendant) fails to deliver vacant possession of the property in the manner stipulated

in cl. 27 within the time stipulated, namely 36 calendar months from the date of the agreement, then the purchaser (ie, the plaintiff) becomes entitled to LAD calculated from day to day at the rate of 10% per annum of the purchase price from the expiry date of the delivery of vacant possession until the date the purchaser takes vacant possession of the said property).

[15] After the evidence had been led by both parties in the 2008 proceedings, the plaintiff then made an oral application to withdraw its claim for LAD. It sought to do so without prejudice to bring proceedings in this aspect on a later date. Accordingly on 22 October 2012, the High Court granted the plaintiff leave to withdraw this prayer upon terms namely "... without prejudice to the plaintiff filing in the future a similar claim or a new claim for damages under cl. 26.2" of the principal agreements."

[16] On 30 October 2012 the High Court delivered judgment on the 2008 proceedings and granted the relief sought by the plaintiff save for prayer (c) pertaining to the cancellation of the architect's certificates which relief was not granted. It was further ordered that general damages were to be assessed.

[17] After this on 6 December 2012, almost six weeks after the delivery of decision, the plaintiff through its solicitors gave notice to the defendant that it was now prepared to and intended to take vacant possession of the subject properties.

[18] Taking the December date as the date of taking over of vacant possession, the plaintiff demanded through its solicitors a claim for LAD of some RM869,816.92 computed on the basis of a delay of five years and 133 days. *Vide* the originating summons here the plaintiff seeks payment of this sum.

[19] The defendant objects to this claim maintaining that it is entirely inequitable as the defendant did in fact hand over vacant possession of the property *vide* its letter of 10 January 2007 and that pursuant to cl. 27 of the principal agreement (which was not varied by the subsequent agreements) vacant possession was deemed to have been taken by the plaintiff 14 days from the expiry of the notice issued to it.

[20] The issue that arose for adjudication before the learned Sessions Court Judge was whether the defendant was in fact liable to make this payment to the plaintiff. The learned Sessions Court Judge concluded that the defendant was in fact so liable. She did so on the basis of a simple construction of cl. 26(3) which she concluded, answered this question irrefutably in favour of the plaintiff. She considered the clause which provided that LAD was to be computed from the date when

delivery ought to have been effected, ie, 27 July 2007 until the day when it was actually delivered which she concluded to be 7 December 2012. She dismissed the defendant's contention that vacant possession had in fact been given effectively as of the issuance of the certificate of fitness for occupation by DBKL under s. 27(4) of the principal agreement.

[21] The learned Sessions Court Judge found this to be incongruent with the decision of the High Court in the 2008 proceedings where the learned judge in allowing the plaintiff's prayers, delivered an order to the effect that the subject properties had not been practically completed and that vacant possession had not been validly given. Therefore she found the plaintiff's claim to be well founded and she computed the quantum due and owing as LAD by using the 'opening date' and 'closing date' stipulated in cl. 26.

[22] *Vide* this appeal the defendant is aggrieved with the conclusion arrived at by the learned Sessions Court Judge contending that the plaintiff's claim is without merit because, *inter alia*:

(i) The plaintiff has tactically put forward an exaggerated claim for delay which is entirely disproportionate with the underlying complaint relating to the failure of the defendant to build the villas in accordance with contractual specifications;

(ii) The construction adopted by the Sessions Court ignores the contractual mechanism for delivery of vacant possession in cl. 27 and essentially allows any house buyer under a contract of this nature to unilaterally determine when it wishes to take possession. In this way a claim for LAD can be mounted at the option of the house buyer at any time it chooses. This it is contended is not the proper construction or purpose to be attributed objectively to cls. 26 and 27;

(iii) Upon the interpretation so advanced, the plaintiff's claim for delay, ie, five years and 133 days, far exceeds the contractual time that was envisaged to build the whole of the subject properties, namely three years.

[23] The appeal before this court is by way of re-hearing according to O. 55 r. 2 of the Rules of Court 2012. As such this court may consider the case afresh without reference to the reasons and written grounds of the lower court judge. It is considered as if the case comes before this court for the first time. (see 2013 Malaysian Civil Procedure text).

[24] I have considered and read the submissions of learned counsel for the plaintiff, the defendant as well as the grounds of judgment of the learned Sessions Court Judge. It appears to this court that the plaintiff's

primary grievance or claim against the defendant was for the defective works carried out in relation to the two villas. Essentially it is a claim for damages for rectification as a consequence of the failure of the defendant to build the two villas in accordance with the contract specifications.

[25] The normal measure of damages for a defective building or a building not constructed in accordance with contract specifications is the cost of reinstatement or so as to meet contractual specifications as at the time the defects were discovered (see *East Ham Corporation v. Bernard Sunley & Sons Ltd* [1966] AC 406). Consequential losses which arise would include damages for loss of use of the building during the time taken for the repairs required to meet the contractual specifications of the contract. In other words the consequential losses would include damages for the delay incurred in repairing the building so as to compensate the owner for the delay in his ability to occupy the subject property.

[26] The normal measure of damages for a defective building is not liquidated and ascertained damages for delay in completion. This category of damages arises when the developer has failed to complete the building within the specific period stipulated under the contract. In the instant case it is not in dispute that:

(i) The defendant gave notice *vide* letter dated 10 January 2007 to the plaintiff to take delivery of vacant possession of the subject properties within 14 days from that date;

(ii) Clause 27(4) of the contract provided that the purchaser is deemed to have taken delivery of vacant possession upon the expiry of 14 days from the date of the notice, in this case ten days from 10 January 2007, ie, 20 January 2007, whether or not the purchaser has actually entered into possession or occupation of the said properties;

(iii) The certificate of practical completion had been issued by the project architect on 20 December 2006;

(iv) The certificate of fitness for occupation had been issued by Dewan Bandaraya Kuala Lumpur.

[27] Having considered the entirety of the contract between the parties it is evident that cl. 26 deals with the specific time within which the villas in dispute were to be completed. Under cl. 26(1) the villas were to be completed within 36 months of the date of this agreement, ie, on or by 26 July 2007. Clause 26(2) provides specifically that if the defendant fails to deliver vacant possession of the villas "in the manner stipulated in cl. 27 herein ..." then and only then is the defendant liable to pay the plaintiffs liquidated and ascertained damages which is to be

computed in accordance with the formula stipulated therein. Clause 26(3) then stipulates (presumably for the purposes of limitation) that the cause of action for a claim for LAD accrues as of the date when the purchaser, in this case the plaintiffs, take vacant possession of the villas.

[28] Clause 27 stipulates the manner of delivery of vacant possession as set out above. It therefore follows from a construction of the two clauses that:

(i) Clause 26 provides a remedy for a precise quantum of damages when the developer has failed to deliver vacant possession of a property to the purchaser. This means that the developer must have delayed or abandoned the completion of the property *in toto*. The clause does not provide a remedy in a situation where there developer, ie, the defendant has in fact completed the works but has done so in a shoddy manner or such that it fails to meet contractual obligations;

(ii) Clause 27 provides the contractual mechanism for the delivery of vacant possession. It requires the certificate of practical completion and the certificate of fitness for occupation to be issued, whereupon notice is given to the purchaser. Deemed possession takes place within 14 days thereafter whether or not the purchaser takes possession of the buildings;

(iii) Clause 26(2) which deals with the grant of LAD, specifically provides that LAD only becomes payable when the defendant developer fails to deliver vacant possession of the villas in the manner stipulated in cl. 27. In the instant case it is not in dispute that the defendant did in fact complete the works, although not according to contract specifications. The defendant complied with the provisions of cl. 27.

(iv) The contract in the instant case was never terminated for repudiatory breach (see *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26). It is trite that in the event of a breach there are two options open to the "wronged" party – either to:

(a) treat the breach as amounting to a repudiatory breach (if the breach warrants being so dealt with) going to the root of the contract, terminating the contract and claiming for damages arising there from. In the instant case that would amount to a termination of the contracts for the two villas and a claim for the repayment of the entire consideration or purchase price;

(b) Alternatively it is open to the wronged party to stipulate the breach, but affirm the contract such that it is concluded, and upon conclusion claim damages for the breach. This is clearly the option or election that the plaintiffs in the instant case made. This is because they did not repudiate the contracts but chose to accept the houses, electing instead to make claim for damages for the breach occasioned by the defective workmanship in the villas.

[29] It follows from the fact that the plaintiffs elected option (b) namely to affirm the contract that:

(a) They accepted the villas but sought compensation for the damage they suffered as a consequence of the defective workmanship that did not meet contract specifications;

(b) The contracts remained afoot, such that cl. 27 comes into play or continues to subsist, notwithstanding the breaches occasioned by the defective workmanship;

(c) As cl. 27 continues to subsist it follows that vacant possession is deemed to have been given to the plaintiffs with effect from 14 days of the date of the notice issued by the defendants dated 10 January 2007;

(d) The decision above does not run awry of the 2008 High Court decision because the learned Judicial Commissioner found there that vacant possession had not been validly delivered. Such a finding arose as a consequence of the conclusion that the buildings had been defectively built. It therefore followed that the plaintiffs are entitled to compensation for the reasonable time during which they would be deprived of the use of the villas pending the repairs carried out to ensure that the buildings met contractual specifications. I am fortified in this conclusion by the clear finding of the learned judge that the certificates of practical completion are not invalidated. In any event it must be borne in mind that the primary dispute before the learned judge was whether or not the buildings met contract specifications and not that the defendant had failed or neglected to provide vacant possession within the time specified under the contract. It is the plaintiffs who framed the prayers so as to seek a declaration that vacant possession was not validly given. This does not mean under the present contract that no vacant possession was given by the defendant. On the contrary, as stated above, pursuant to cl. 27 vacant possession had been duly given to the purchasers 14 days from 10 January 2007;

(e) It follows that the plaintiffs are entitled to a measure of damages equivalent to the cost of repair as well as the loss of use of the buildings for a reasonable period of time. This latter limb arises as consequential loss and should be an estimate of the time taken to effect the requisite repairs to bring the villas up to contractual specifications;

(f) It does not follow from the foregoing that the plaintiffs are entitled to choose a date which they deem fit to 'take' or 'claim' vacant possession. To allow such a construction of cls. 26 and 27 would give rise to a vastly exaggerated claim, as it would then theoretically be open to the plaintiffs to take possession some ten years after the practical completion of the building and make claim for LAD. In this context see *Leong Lai Kuen v. Sentul Murni Sdn Bhd* [2004] 5 CLJ 25 where James Foong J (as he then was) observed in a similar situation as follows:

> By such delay in exercising his rights, the purchaser may be taking advantage of the more attractive benefit set out in the artificial formula for computation for late delivery. The aggregate may even exceed the total value of the house, if it is completed. Would this not be defeating the very objective of the compensation?

(See also *Kris Heavy Engineering & Construction Sdn Bhd v. Mah Sing Properties Sdn Bhd* [2011] 1 LNS 572; [2011] 5 AMR 128 per Lee Swee Seng JC).

(g) The cases of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1 and *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 have no bearing on this case because this is not a case where the villas were not completed within the stipulated period under the contract. In other words this is not a case relating to delay in the completion of the villas, but is instead a claim for damages arising from a failure of the defendant to construct the building in accordance with contractual specifications. As such the remedy available the plaintiffs is the cost of effecting such repairs to meet contractual specifications as well as consequential loss arising for the reasonable time during which the plaintiffs suffer a loss of use of the villas. This latter limb ought to be a reasonable estimate of the time taken to effect repairs.

(h) In this context the plaintiffs are required to mitigate their losses by ensuring that the repairs are effected within a reasonable time. They are entitled to be compensated on the basis of an objective and reasonable estimate of the time taken to effect the requisite works. This is not equivalent to a claim for liquidated and ascertained damages, although the quantum so agreed upon may well be a

reasonable estimate for the purposes of determining the quantum per day of delay. The plaintiffs' duty to mitigate is well documented in the cases of *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 per Dzaiddin SCJ (as he then was) and *Joo Leong Timber Merchant v. Dr Jaswant Singh Jagat Singh* [2003] 5 CLJ 286; [2003] 5 MLJ 116 per Jeffrey Tan J (now FCJ).

Conclusion And Orders

[30] For these reasons it appears to this court that the learned Sessions Court Judge erred in allowing the plaintiffs' claim for liquidated damages for period of some five odd years giving rise to a claim for RM869,816.92 together with interest. This is a greatly exaggerated claim which does not achieve the purpose of compensating the plaintiffs for their loss but instead flouts the principle that the plaintiffs are not to profit or take advantage by claiming for damages well in excess of the wrong suffered. It is necessary for the plaintiffs to lead evidence in the course of any assessment of damages hearing, that they have in fact made an attempt to mitigate the losses they have suffered. This must be a question of fact which cannot be determined by way of an originating summons. In other words whether or not the plaintiffs did in fact mitigate their losses is a question of fact. So is the issue of an objective assessment of the time taken to effect the repairs necessary such that the villas meet the contractual specifications.

[31] The judgment of the learned Sessions Court Judge is therefore set aside. In order to enable the plaintiffs to recover the consequential losses arising from the defective buildings as soon as possible it is further ordered that:

(i) The originating summons here is converted to a writ action;

(ii) The claim here is consolidated with the assessment of damages hearing which is being conducted in relation to civil suits no: S6-22-653-2008 and S7-22-658-2008. This is to enable the parties to lead evidence in relation to the proper estimate of damages payable by the defendant to the plaintiffs for the loss of use of the two villas as a consequence of the time taken to effect repairs to the villas so as to meet contractual specifications. For avoidance of doubt it is reiterated that this loss is not a loss for failure to deliver vacant possession, but instead damages recoverable for the delivery within the contractually specified period of villas which did not meet contractual specifications.

[32] The appeal is therefore allowed with costs of RM7,000.